No. 1220.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

STANLEY KUZEK,

Appellant,

vs.

CHARLES F. MAGAHA and WILLIAM ELLIOTT,

Appellees.

APPELLANT'S BRIEF.

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STATEMENT OF THE CASE.

This action was brought by Stanley Kuzek in the District Court for the Second Division of the District of Alaska, to recover rent or royalty claimed to be due him as lessor of a certain mine, the Marion Bench Claim, near Nome from appellees as lessees thereof, in accordance with the terms of a written lease set forth in the complaint. This agreement as pleaded provided that the lessees should

> "pay the said lessor or his legal representatives or assigns 75 per cent of the gross output of said claim during the year ending June the fifth, 1904" (trans. p. 5).

The prayer of the complaint also asked for an accounting and provisional relief *pendente lite.*

The answer denies that the lease thus pleaded correctly sets forth the agreement of the parties thereto respecting the percentage of gross output payable to the lessor, and avers that one of the appellees, in preparing the duplicate original thereof for appellant,

> "erroneously wrote in the words '75 per cent' to be paid the lessor, instead of '25 per cent' which was written in said original lease", and "that in signing and executing said duplicate or copy of said lease the plaintiff and defendants both intended to execute an exact duplicate of the original lease entered into between the parties, and at the time the same was signed by the plaintiff and defendants both the plaintiff and defendants believed said copy or duplicate lease to be an exact and literal copy of the original lease entered into between the parties hereto, which provided for the payment of 25 per cent of the gross output of said claim to plaintiff. That the mistake made by plaintiff and defendants in copying and signing said lease was mutual, and was inadvertently made by the defendant Elliott in copying said original lease, and was not known to either the plaintiff or defendants until considerable time afterwards. That said copy or duplicate lease does not and did not express the true agreement between the parties as set forth in the original lease entered into between them, but by said mistake and inadvertence aforesaid, it was made to appear thereby that the plaintiff, lessor, was entitled to 75 per cent of the gross output of said claim,

whereas and in fact the true mutual agreement between the parties was and is that the defendants are entitled to 75 per cent of the gross output of said claim, and the plaintiff to 25 per cent. That it was not intended by drawing up and signing and executing said copy or duplicate lease to change or modify in any particular the original lease in writing, entered into between the parties aforesaid'' (trans. p. 17).

I.

POINTS AND AUTHORITIES.

AN EQUITABLE DEFENSE SEEKING THE REFORMATION OF THE LEASE WAS IMPROPERLY PLEADED IN THE CASE AT BAR.

The court will note at the outset that the answer tenders an equitable defense in an action at law. Respecting this point, errors are assigned by appellant based, *inter alia,* upon the admission of testimony tending to show that a lost original was shown to various persons, and that its wording differed as respects the amount of royalty from the wording of the subsequent original pleaded and offered in evidence by appellant, and upon other testimony whereby appellees sought the reformation of the contract (trans. pp. 201-205), as well as upon the court's action in decreeing such reformation. It appears that objection was made in appellant's behalf during the trial and overruled to evidence offered by appellees tending to show their loss of the other duplicate original of the contract and its examination before such loss by various persons and the grounds of such objection were that it was irrelevant,

immaterial and incompetent, *i. e.,* not within the proper issues of the case (trans. pp. 42-43); and subsequent objections on like and further grounds were made to evidence offered of a variance between the lost instrument and that pleaded by appellant in evidence (trans. pp. 47-48, 65, 67-68, etc.). It will be further noted that

> "it was thereupon agreed by counsel and the Court that each and every ruling of the Court during the trial of the case should be deemed duly excepted to" (trans. p. 42).

Even if, however, no error was specially assigned in the court below based upon the interposition of this defense in an action of a legal character,

> "the court at its option may notice a plain error not assigned",
>
> *Rule 11,* Circuit Court Appeals, 9th Circuit.

An assignment of error is not necessary to give the court on appeal authority to notice a plain error,

> *U. S. v. Tennessee etc. R. Co.,* 176 U. S. 242;

and we believe the tendency of the court is towards liberality in noticing plain errors in the record though unassigned in the court below. The error we now complain of is, we submit, patent on its face and calls for correction; for the court will observe that this is not an action for the recovery of real property or the possession thereof and appellees do not seek to justify their possession by means of an equitable title. Had the action been of that character, such a defense would have been allowable.

> *Code of Civil Procedure of Alaska,* sec. 361.

The suit, however, was brought to recover money claimed to be due the lessor under a lay or lease; and in the absence of any statute to the contrary no equitable defense would lie thereto. If appellees desired a reformation of the lease in any respect such relief could only be obtained by a bill in equity filed on their behalf, not by an answer in a common law suit. In the case of

Shields v. Mongallon Exploration Co. et al., 137 Fed 539, 546-548,

which was an action of ejectment, where

> "the plaintiff in error does not and did not in the court below question the power of the trial court to deal with the equitable defense which was interposed in the present case, nor its power to proceed and decree the affirmative relief which was accorded in ordering the reformation of the deed",

this court discussed the character of the defense there interposed; and the conclusion is irresistible that it is only in cases of the nature especially provided for in the section of the Alaskan Code just referred to that an equitable defense will lie. The court said:

> "Under the system which prevails in the Circuit Courts of the United States, if a defendant, after being brought into a court of law to answer the plaintiff's complaint, discovers that his defense lies in a reformation of his written contract or deed, his remedy is to file a bill in equity praying for such reformation, and for an injunction against the prosecution of the law action until a decision of the suit in equity. The Alaskan Code (31 Stat. 393, c. 38), making certain provisions for actions of an equitable nature, contains the proviso: 'This section shall not be construed so as to bar an equitable owner in possession of real property from defending his possession by means of his equitable title.'

> This provision was adopted from the laws of Oregon (B. & C. Comp. sec. 392), after it had been held in that State that the equitable defense so allowed to be pleaded could be used only for the purpose of defending possession, and not for the purpose of obtaining affirmative relief. *Spaur v. McBee,* 19 Or. 76, 23 Pac. 818."

We respectfully submit that the error in this respect committed by appellees in the court below is so palpable that we feel justified in asking the court to notice it, even in the absence of a specific assignment thereof.

Further criticism may properly be made of the answer for its failure to separate the strictly defensive portion of its allegations from that part which purports to set forth new matter constituting the counterclaim sought to be established upon which affirmative relief was asked and granted.

II.

THE EVIDENCE, AND ERRORS IN ADMITTING SOME OF IT, PRINCIPALLY RELATING TO CONVERSATIONS AND CUSTOMS.

Reformation of the lease or lay agreement was sought by appellees on the ground of an alleged mutual mistake of both parties to the contract (trans. pp. 16-17). We contend that, even if proper issues were tendered by the answer to the complaint, the evidence is insufficient to warrant the relief granted and that therefore the decree of the court below should be reversed. It will be of interest, therefore, to note what evidence ap-

pellees introduced to support their contention; and in stating this evidence we shall briefly comment upon some errors made by the court below and properly assigned here, in allowing witnesses to testify as to the existence of alleged conversations and mining customs which did not in any way tend to throw light upon the written agreement made by the parties thereto. The errors to which we shall shortly advert were material and prejudicial to the rights of appellant, for it must be presumed that the trial court relied wholly or partially upon the testimony thus introduced in reaching its conclusion. The Supreme Court of the United States has said that errors in the reception of evidence will be held material where it does not appear beyond doubt that they could not prejudice the rights of the parties against whom the evidence was received.

Mexia et al. v. Oliver, 148 U. S. 664.

And no presumption can be made in favor of the judgment of a lower court where error is apparent in the record.

U. S. v. Wilkinson et al., 12 How. 246.

In this connection the court will bear in mind that

> "on an appeal in an equity suit, the whole case is before us, and we are bound to decide it so far as it is in a condition to be decided."

Ridings et al. v. Johnson et al., 128 U. S. 212;

Central Trust Co. v. Seasongood, 130 U. S. 482;

an appeal in equity bringing up all matters decided in the court below to appellant's prejudice.

Buckingham et al. v. McLean, 13 How. 150.

We may properly assume that the bill of exceptions includes all of the evidence, although it does not expressly so state, if the entries sufficiently show that all of the evidence is included.

Gunnison County v. Rollins et al., 173 U. S. 255;

and

> "no evidence can be looked into in this Court, which exercises an appellate jurisdiction, that was not before the Circuit Court; and the evidence certified with the record must be considered here as the only evidence before the Court below."
>
> *Holmes et al. v. Trout et al.*, 7 Peters 171.

One of the appellees, William Elliott, testified that he and his co-appellee Charles F. Magaha signed the duplicate original lease pleaded and offered by appellant in evidence, and that it was written out by this witness about April 4th, a month after the first original had been signed by the same parties thereto (trans. p. 41). According to his testimony, he wrote out both instruments himself (trans. p. 42) and showed the earlier one to one Taylor, who took it to one Cowden; the latter also examining it. Taylor retained possession of it three or four days and it was afterwards left with Judge Reed. The witness next saw the paper when he got it from one English and he also claimed to have exhibited the document to one Fred Strelke (trans. p. 53).

> "On the 1st of April, I took it down to the claim, and put it in a box we had to put papers in; it remained there possibly four or five days, when I took it to draw up the duplicate which is now before me. After the duplicate was drawn up I put the original lease in the box again, where it re-

> mained until the 7th or 8th of April, when I turned it over to my partner, Magaha, since which time I have never seen it. Since then I have searched for it in Magaha's cabin here, and at the house on the claim; I have made inquiry since, but have never heard of it. Mr. Magaha put it in his inside pocket, and left for Nome; I have never seen it since'' (trans. p. 44).

Elliott further testified that he had the first original before him when he prepared in his own handwriting the duplicate original and made a mistake, *''an oversight''*, as he termed it, in copying the terms of the lay (trans. pp. 47-48). Before the first original had been drawn a draft of the agreement had been prepared which was afterwards offered in evidence (trans. p. 59) and which had been partially written out by this witness (trans. pp. 54-55, 59, 62-64). This draft sustains appellant's contention, *making the same provision as the duplicate offered in evidence respecting the seventy-five per cent royalty payable to the lessor.*

In

2 Pomeroy's Equity, 2d ed., sec. 859,

the learned author says that an ancillary document, such as the draft of an instrument sought to be reformed, is of great aid to the court, but in its absence relief *may* be granted by parol evidence; and Judge Story says that a preliminary instrument exerts a controlling effect upon a subsequent agreement where reformation of the latter is desired, antecedent parol negotiations being merged in the written contract.

1 Story's Equity, 10th ed., sec. 160;

1 Duer on Insurance, p. 71;

Collett v. Morrison, 9 Hare 162;
Phoenix Fire Ins. Co. v. Gurnee, 1 Paige Ch. 278;
Van Tuyl et al. v. Westchester Fire Ins. Co., 55 N. Y. 657;
Wyche et al. v. Greene, 11 Ga. 159;
Delaware Ins. Co. v. Hogan, Fed. Cas. No. 3765;
Oliver v. Mutual etc. Ins. Co., Fed. Cas. No. 10,498.

In the case of

Equitable Ins. Co. v. Hearne, 20 Wall. 494,

where reformation of a contract was sought in order to make it conform to the agreement contained in preliminary correspondence between the parties, the court observed:

> "It is not denied that the correspondence constituted a preliminary agreement. Such, clearly, was its effect. The policy was intended to put the contract in a more full and formal shape. The assured was bound to read the letters of the company in reply to his own with care. It is to be presumed he did so. He had a right to assume that the policy would accurately conform to the agreement thus made and to rest confidently in that belief. It is not probable that he scanned the policy with the same vigilance as the letters of the company. They tended to prevent such scrutiny, and, if it were necessary, threw him off his guard."

If appellees were here seeking reformation of a lease which did *not* conform to the terms of the preliminary draft of the agreement, this, with many other cases, would be ample authority to insure the success of their contention.

Elliott was asked on cross examination:

> "Was the duplicate in the same words that the original was in except the word '75', the figures '75'?

to which he answered,

> "Well, I could not say that hardly; there might be a difference; it was a mistake in putting down 75 per cent to the lessor, I always thought so."

And he further testified as follows:

> "Q. With that exception, in your opinion, it is an exact copy?
>
> A. As far as I can recollect, it is, and still there may be a word there that was not written at all.
>
> Q. It was your intention to make an exact copy, was it not?
>
> A. Of the original, yes, sir, what I claim to be the original, the first one I drew up.
>
> Q. I want to ask you again, although you have already answered, did you or did you not use the original at the time you made this duplicate?
>
> A. *I used the original, I took it there to their house for that purpose, but in regards to reading it or using it, I can't swear I did, I thought I was familiar with it.*
>
> Q. You don't know whether it was used at all?
>
> A. I may have referred to it, I might have, although I knew the dates.
>
> Q. I am asking you the question, whether or not you used the original to your best recollection?
>
> A. *I tell you the original laid there for that purpose.*
>
> Q. That is not an answer to my question.
>
> A. I don't know whether I used it or not.
>
> Q. What is your best recollection about it?
>
> A. That is it.
>
> Q. Your best recollection then is that you did or did not?
>
> A. I am not positive.

Q. Which way do you think it was?

A. I am not positive, to the best of my recollection I don't know which way it was, whether I used it or not.

Q. You may or may not?

A. Yes.

Q. You were asked for a duplicate?

A. Yes, sir.

Q. You drew this up for them to sign as a duplicate?

A. I did.

Q. You didn't care whether it was an exact copy or not?

A. I certainly did.

Q. You didn't compare it with the original?

A. *I made a thousand mistakes in my time where I suffered afterwards.*

Q. Did you do it?

A. I can't say as to that.

Q. Then you might have compared it; then it might have been compared?

A. It might or might not, that is, in comparing the two I might have used it or might not'' (trans. pp. 56, 57-58).

This witness does not recollect whether or not the draft on which these instruments were based and which provided for the payment of the same royalty to appellant as did the duplicate original in his possession, was read over at the time of preparing therefrom the first original. He says:

''There was some reading done before it was all wrote; I couldn't recollect whether it was read over two or three times or not; I know about what took place, I am satisfied in my own mind that it was not read over. *I know that it was handed around to see if it was all right,* I had to take it to town and get there by 2 o'clock, and it was after 2 o'clock, or close to 2 o'clock, before I started;

> Mr. Kuzek did not ask for a duplicate; I told him 'I will make another one out tomorrow when I come down', he says 'all right'; on April the 4th he seemed to be pretty insistent to get the duplicate; on that night right after supper he wanted it signed; I told him I would fix it up tomorrow; that I preferred to fix it the next day; and he said he wanted it right then; and I said 'all right, I will do the best I can at it' " (trans. p. 60).

Apparently Mr. Kuzek ominously feared that some change might be made in or mishap befall the paper and he wished to be protected, but his precaution was of no avail apparently; and like precaution never can be of any avail if contracts can be changed under the guise of reformation upon such evidence as that offered in the case at bar.

The witness admitted that he wrote the entire duplicate original except the signatures (trans. p. 60). His further cross examination upon this point is instructive.

> "Q. It" (the lay agreement produced by plaintiff) "says here 'To pay to said lessor or his legal representatives or assigns 75 per cent'?
>
> A. I see that.
>
> Q. It says to pay to 'his' legal representatives or assigns 75?
>
> A. I see.
>
> Q. You understand the meaning of the word 'lessor'?
>
> A. I don't know as I may have then. I certainly know it now.
>
> Q. Did you at that time?
>
> A. I think I did, yes.
>
> Q. You have been a mining man?
>
> A. I have been a mining man around where they never use anything of that kind.
>
> Q. You didn't have to have occasion to use it to know what that means?

A. I know what it means.

Q. You knew what it meant at the time, did you?

A. I did, yes, sir.

Q. And when you put in the 75 per cent in there, you knew that you were giving it to the lessor, didn't you?

A. Seventy-five; that was my mistake.

Q. You knew that you were giving it to the lessor?

A. I didn't know I was giving him 75 per cent.

Q. You were giving to the lessor or 'his' not 'their' legal representatives?

A. I understand that.

Q. You didn't know that you were giving the lessor 75 per cent?

A. *I might have been thinking of something else when I was writing.*

Q. *You might have been careless?*

A. *I might have been so.*

Q. *You think you were careless, don't you, when you wrote that?*

A. *I know I was.*

Q. *You know you was?*'' (trans. pp. 60-62).

His co-appellee Magaha testified that he signed appellant's duplicate lease April 4th and

> ''another paper of similar import to this a month previous'' (trans. p. 45).

Elliott gave the latter paper to him April 7th or 8th and he lost it (trans. p. 46). His recollection as to the wording of the provision respecting the royalty in the first original agreement is not clear. Upon his direct examination he was asked and testified, in part, as follows:

> ''Q. I call your attention to paragraph marked 4, which reads: 'To pay to the said lessor his legal ' representatives or assigns 75 per cent of the gross

' output of said claim', etc., and I ask you to state if you can, what was the wording of the original lease in that paragraph?

Mr. Bruner: Objected to the question as irrelevant, immaterial and incompetent, and not the best evidence.

The Court: The objection overruled.

A. Well, to my best remembrance, it read, 25 per cent to the owner, and 75 per cent to Mr. Elliott and myself. I can't say whether the words '75' in the original lease was in writing or figures or both, but the figures were there, 25; but I couldn't swear that the writing and figures both were there; I signed the duplicate in the morning at the breakfast table at Mr. Kuzek's residence on Marion Bench; Elliott, Mrs. Kuzek and Kuzek had already signed it; I think Mr. and Mrs. Kuzek were both there at the time.

Upon cross examination he said:

When I signed the duplicate, there was only one paper present at the time; *I didn't read it over; they shoved it up to me and I signed it; Billy* (his co-appellee, Elliott) *told me in the morning that it was all right; all I had got to do was to sign it, it was made out the night before.*

Q. *You relied entirely upon the statements of your partner as to the terms of this lease?*

A. *I did, if I hadn't I should have read it over, but I didn't read it over.*

Q. *There were no representations to you by Mr. and Mrs. Kuzek in regard as to whether it was a true copy or not?*

Mr. Orton: Objected to as immaterial, irrelevant and incompetent.

Mr. A. J. Bruner: We are trying to find out what took place.

The Court: Objection overruled.

A. *No, sir. I am positive that I didn't read the paper over at all before signing it;* I made no comparison between the duplicate and the original; the

> original was not there at the time; nor was the pencil copy there; I did not read the duplicate aloud, nor did Mr. or Mrs. Kuzek read the paper aloud, at that time; there was no comparison made between that paper and the pencil memorandum; I am almost positive I signed the duplicate at the breakfast table, and not in the sleeping-room adjoining it; I did not have the original paper in their house at that time; I made no comparison whatever, nor did Mr. or Mrs. Kuzek in my presence at that time read the copy to me or make any comparison between the duplicate and the original or the pencil copy. I could not say whether I used the same pen and ink as the others'' (trans. 65-67).

D. M. Taylor testified for appellees that the first original provided for a 25 per cent royalty to the lessor (trans. p. 68), and Fred Strehlke said:

> ''I read the paper at that time; I do not remember the date of it; I don't know by whom it was signed; I never paid much attention to it; several names were signed but I only noticed one, Mr. Elliott's; there was a name signed as a witness, but I didn't notice who it was; it referred to the Marion Bench Claim; it provided for the payment of 25 per cent royalty to the lessor; I read the lease over'' (trans. p. 68).

C. G. Cowden also testified on behalf of appellees that the first original merely gave to the lessor 25 per cent royalty (trans. pp. 69-70), the court erroneously, in our opinion, allowing him upon his direct examination to give his reasons for examining the paper. Upon his cross examination he admits that

> ''What I have stated is merely to the best of my recollection, after an examination; I am not

willing to positively swear that the words were so and so'' (trans. p. 70).

Thereafter a number of witnesses were called and recalled on appellees' behalf for the purpose of showing that appellant had admitted he was receiving only 25 per cent royalty, and for the further purpose of showing what was the customary royalty for mines in the neighborhood of the Marion Bench Claim. Many of these alleged conversations took place *some time prior* to the date of the first original agreement made in March and some are alleged to have occurred *between the time when the first and the time when the duplicate agreements* were prepared and executed. For instance, Taylor, when recalled, was, under objection made by appellant's counsel which fully state the grounds thereof (trans. pp. 71-73), and are made the subject of the fifth assignment of error (trans. p. 202), allowed to testify to a conversation which he claims took place before the first original lease was prepared, wherein some one said,

> '' 'Here is Mr. Kuzek; he can tell you what it is and so can I'; he says, 'We are to receive 75 per ' cent of everything we take out up to the 5th day ' of June, with the privilege of washing our dumps ' up any time after'; he says, 'Isn't that right, Kuzek?' To which Mr. Kuzek replied, 'Yes'. He says, 'You can take your papers up with you; ' we can make them out, and it won't take us ten ' minutes to sign them—you can take them up as ' you go'; that was the sum and substance of the conversation'' (trans. pp. 72-73).

This testimony and that of other witnesses as to conversations which are claimed to have taken place

between appellant and others respecting the amount of royalty the former was receiving or going to receive from the proceeds of the Marion Bench Claim, on which testimony we shall not particularly dwell because it is largely repetition, was, we submit, clearly objectionable, since appellees were seeking to reform an instrument made *after* the date of these alleged conversations; and even if they took place as narrated, *non constat,* but that the parties to the written instrument modified therein the previous oral arrangement under which appellees claimed to have been occupying and mining appellant's ground. It hardly requires the citation of authorities to demonstrate the validity of the objections made to this line of evidence and the correctness of our contention that reversible error was in this respect committed by the learned trial court.

Regarding the value of such alleged declarations or admissions, a leading case on the subject of reformation of contracts says:

> "It is the wise and salutary rule of our common law that whenever a bargain has been reduced to writing, this is conclusive as to the parties, and is not to be contradicted by parol evidence. *It was that there is no small risk that casual talk, hasty or thoughtless declarations, propositions tendered in the course of a negotiation but not finally agreed upon, might be misunderstood or misinterpreted by careless and inattentive hearers, or misrepresented by artifice or fraud.* But the deliberate formality of a written instrument affords usually the highest proof of the real terms of the final contract whether executed or executory. If this be true as to a simple article of agreement, or memorandum of a sale, then a contract of sale of land,

> ratified and attested by deed formally executed, delivered and received, stands on a still more solid foundation. In law, it is not to be contradicted, and when equity applies its peculiar powers to modify or rescind such an instrument, it is still to be regarded as the very highest presumptive evidence of the real contract, and throws upon the party contesting it, the burden of direct and positive proof of the facts relied upon to invalidate the instrument."
>
> *Marvin v. Bennett et al.,* 26 Wend. 168.

Many of these witnesses were also permitted by the court to testify to the *customary* royalty collected by the owners of claims in that district or neighborhood, which we contend was equally objectionable; for instance, the same witness Taylor was (trans. pp. 73-75) allowed by the court below, under objection interposed by appellant's counsel and made the subject of the sixth assignment of error *in extenso* (trans. pp. 202-203), to testify that the amount of royalty usually paid or reserved upon claims of the character and description of the Marion Bench Claim was 25 per cent. Conceding for the argument that this witness was, and other witnesses upon the same subject were capable of testifying upon the matter, although in many instances there was absolutely no foundation laid for such testimony, what relevancy had it to the question controverted? There is no evidence that the parties sought to incorporate this or any custom in their written instrument. Suppose it had been the custom for mine owners to allow lay men to work these claims for a prescribed period without any royalty whatever, would that custom be evidence of any value or materialty to show the con-

tents of a written agreement between a mine owner and a lay man concerning the operation of a mine, where perhaps the very motive of reducing the contract to writing was to provide terms contrary to any such prevailing custom? If a lease were sought to be reformed, would evidence be properly admissible to establish that custom which the parties sought perhaps to negative by their writing?

Hearne v. New England Etc. Ins. Co., 20 Wall. 488.

Further examination of the record shows that like testimony was given under similar objections by other witnesses and properly assigned as error. Neither the witnesses Cowden nor Marsh (trans. pp. 75 et seq.) were shown to have been competent to testify as to the existence of any custom regulating the collection of royalty by owners of mines from lay men, and we believe that we would unnecessarily consume the time of the court by further reference to this inadmissible evidence. It was objected to in the court below by counsel representing appellant and assigned thereafter as error.

One witness, Johnson, does not give any date whatsoever for the conversation which he claims to have overheard between appellant and some one else as to the amount of royalty which Mr. Kuzek was to receive from the mine (trans. pp. 89-90), and another witness, John Greve, was allowed by the court, under objection, to narrate a conversation which took place *several months before* any written instrument was executed between the parties to this suit (trans. p. 92).

T. M. Reed, the United States Commissioner, was called, among others, on appellees' behalf, and allowed to testify, despite appellant's objection, which is reviewable here under the eleventh assignment of error (trans. p. 204), as to the *purpose* for which the lost original lease was brought to him (trans. p. 93); and his evidence is weak as to the contents of the instrument respecting the royalty.

Before closing their case appellee Elliott was again recalled to the witness stand by appellees and was permitted to testify to a conversation between Taylor and himself in Kuzek's presence

"*before* the contract was reduced to writing",

wherein witness says he asked Taylor if the latter thought the ground would justify him in advancing to appellees some credit upon it, to which Taylor replied

"Sure, I think it will"

(trans. p. 95). Appellant objected to this evidence and bases his twelfth assignment of error upon the court's action in admitting it (trans. p. 204).

It has, we submit, no shadow or semblance of relevancy or competency to support it. It was responsive to nothing and only served to increase the volume of inadmissible evidence before the learned court below.

Finally, appellees once more recalled the witness Cowden, this time as a handwriting expert, in an endeavor to compare certain words written in pencil with corresponding words written in ink, a task which has baffled handwriting experts of greater competency. The court in this connection will bear in mind that the

duplicate original offered by appellant as Exhibit 2 was in ink and wholly, except as to the signatures, in appellee Elliott's handwriting; and the draft of the agreement known as Exhibit 3 was in pencil, partly in Elliott's handwriting and photographed. As the photographs of the documents themselves are not attached to the record, nor the originals before this court, the testimony and references to them given by this witness is obscure and valueless.

It also appears as a part of appellees' case that Mrs. Kuzek did not write any part of the draft agreement upon which the subsequent agreement made in duplicate was based (trans. p. 99).

To meet the evidence offered on appellees' behalf, appellant called but two witnesses, his wife and himself, the former testifying that she well remembered it was the 9th of March when the first original lease of the Marion Bench claim was executed (trans. pp. 99-100); and she particularly set forth the circumstances which impressed the date upon her memory. She recognized the draft agreement referred to, remembering what portion of it her husband wrote and that Elliott filled out the remainder, including the clause relating to the royalty to be paid to the lessor, to wit 75 per cent; for Elliott was a better penman than Kuzek. She further testified in part (trans. pp. 101-104):

> "When he wrote it Mr. Elliott, Mr. Magaha, Mr. Kuzek and myself were all in our cabin on the Marion Bench Claim. Mr. Kuzek said we might draw the paper up and Mr. Elliott was there, and said, *'We will draw up a copy first,'* and Mr. Kuzek had this drawn, this copy sometime in

December, and Mr. Elliott said, 'We will find this out first.' *Mr. Kuzek had attempted to write it and was going to start in and Mr. Elliott said, 'I could perhaps write it better than you could.'* He said that to Mr. Kuzek, so then Mr. Elliott took the paper and sat down and wrote this part which is written in pencil and read it as he wrote it out. He read, 'Pay to said lessor or'—'his'—he wrote 'his' and read it, 'legal representatives or assigns' and wrote the figures '75' and said '75 per cent of the gross output of said claim during'; then he wrote the year 'ending'; he wrote 'ending' and so on down. He wrote 'June' and spelled it as he wrote it out; 'the 5, 1904,' and so on until it was finished; he concluded to write another one as this was not a good copy, being part in lead pencil and part in pen and ink; it was better to write it fully out in one hand-writing with a pen and ink, and I said to Kuzek that Elliott and Kuzek and Magaha better go down and get an attorney or notary public to make out the paper, *and Mr. Elliott said that he could make them out just as good as anybody else, so he took the paper and pen and wrote it down following after the one he had there.* When he wrote the first original, the first lease that was right on top, this was right under and as he went on down, he followed it up—what he had written. After he got it written, Mr. Kuzek held this paper while Mr. Elliott read the other one—the original, and compared the papers to see if they were all right; then he handed the paper over to Mr. Kuzek to look over and read—he didn't read it—he handed it to me, and I read it over, the original, and Mr. Kuzek held the other one—the pencil one in his hand, and I read it aloud, and he compared it as I read. Then I handed it back to Mr. Kuzek, and Mr. Kuzek signed, then Mr. Magaha signed, then Mr. Elliott signed and I signed as a witness; then Mr. Kuzek wanted him to draw up another paper for him that we should keep, and Mr. Elliott says, 'Well, it is late'—it was

about 2 o'clock—and he says, 'We are bound to meet a party in town; I will make out the other copy tomorrow,' he says. Well, Mr. Kuzek thought it was all right and they went to town that afternoon, and Elliott didn't come back that next day. He was in town for about a week or ten days; then he stayed at home about two or three days—I couldn't say how long—and again went to town and stayed a couple of weeks. He came out again about the 2d of April, but I know he was not there the 1st of April, and worked about two days, and then Mr. Kuzek called his attention to drawing up the copy of the lease, so we could have one as well as they had. After supper, on the evening of the 4th of April, Mr. Kuzek, Mr. Elliott and myself, only being present—Mr. Magaha was not there—and while we were all sitting at the supper table, *Mr. Elliott wrote out this paper, the duplicate. He laid the original lease on the table before him when he wrote this out and also the pencil lease was laying on the table at the same time;* he wrote on down followed the original with this, and followed this on down as he did the first—the pencil one; and then after he got through with the writing of it, he handed the original over to Mr. Kuzek, and Mr. Elliott read this one out to the three of us, while Mr. Kuzek was holding the original; after he got through, he handed the piece of paper to Mr. Kuzek, and Mr. Kuzek looked it over and said he guessed it was all right. Mr. Kuzek handed this paper to me, still holding the original in his hand and the pencil lease, and I started and read this over aloud. Mr. Kuzek said, 'All right; it is alike'; and I handed it back to Mr. Kuzek and he put the two papers together, and then he signed this lay and then he put it back to Mr. Elliott. Mr. Elliott signed, and then I signed as a witness, and then when Mr. Kuzek wanted to go over and call Mr. Magaha—he was working on the boiler at the time—Mr. Elliott says, 'No, it is no hurry; Mr. Magaha can sign it tomorrow.' Then the next following

> day, on the 5th of April, right after dinner, Mr. Kuzek called him into the little room we had and he signed this lay. I was standing in the room when he signed this; he read it before he signed it, and said it was all right, and handed it back to Mr. Kuzek, and it has been in Mr. Kuzek's possession, you might say, until it came into court. After the original was signed on the 9th of March Mr. Kuzek kept the pencil copy, and put it away with some other papers'' (trans. pp. 101-104).

We have quoted this testimony at length because it appears for the first time to show under what circumstances the drâft of the agreement was made and under what circumstances each of the duplicates was thereafter prepared and executed. Mrs. Kuzek furthermore denied certain conversations testified to by appellees' witnesses (trans. pp. 104-105).

Her testimony was virtually unshaken upon a lengthy cross examination.

Mr. Kuzek, appellant, also called in his own behalf, testified, in corroboration of his wife, that the written lay on the Marion Bench Claim was executed March 9th, 1904, Elliott writing it out. Appellant had, on the previous December 5th, written, or rather filled in, a small part of the draft of the agreement which appears in ink (trans. p. 145); and then, by reason of his poor penmanship, postponed doing anything further on it (trans. p. 146). We here give his statement as to the circumstances attendant upon the execution of the two duplicates in his own language, as it appears in the record:

"At that time Mr. Elliott and Magaha came to my cabin—it was shortly after dinner and I wanted to get my paper. I asked him if I should go with them to town to draw up the paper and they said it was not necessary—'we will draw it up ourselves.' I says, You can draw it up; I started it up and didn't make it complete'; and Mr. Elliott says, I can make out the paper.' I says, 'All right.' I had the paper in my house; I sat down to begin—Mr. Elliott sat down alongside of me; *I passed him this paper, he looked at it, and so we decided to draw up the draft with a pencil. So he did draw up the draft with the pencil and then took another clean blank and wrote out the paper with a pen and ink.* After he did write it out then he says: 'I have to change the line about sluicing,' but he says, 'It is the same meaning, anyhow.' I looked that up, I says, I didn't think that makes much difference.' He says: 'I just shortened it up.' Then he read the paper over and handed it to me. I looked over it. He read it aloud and then he handed it to me, and I looked the paper over and handed it to my wife, and she read it and I held this paper in my hand to see that it all compared. It seems it all compared pretty well except this part, changed about sluicing the dump, and I thought that didn't have any effect in the paper. Then I signed, Mr. Magaha signed and Mr. Elliott signed, and I asked if I should call some of the other men to sign as a witness, and they said, 'Mrs. Kuzek can sign as a witness.' I said, 'That is all right; that is satisfactory'; and so she signed as a witness. Then I handed him the three blanks and asked him to draw up a copy for me, as is usually drawn up, a duplicate, and Mr. Elliott looked at the clock and he says, 'I don't think I have that much time to spare; I will draw up the paper tomorrow for you.' I says, 'That is all right—that is satisfactory'; and he says, 'We have to meet some parties in town shortly afternoon.' I says, 'That will be all right.' They hired me to

take off the boiler for them while they went to town; they went to town and I took care of the boiler for them that afternoon and that night till morning. They took the paper with them and I kept the pencil draft. When I asked Mr. Elliott to draw up the copy for me he says, 'You keep this memorandum; I will draw up the copy tomorrow.' He did not draw up the copy until about the 4th of April.

"*Plaintiff's Exhibit No. 2, the duplicate, was drawn up in my cabin by Mr. Elliott;* Mr. Elliott, Mrs. Kuzek and myself being present. Mr. Elliott came to the cabin, sat down, and pulled the paper out of his coat pocket, and I brought the blanks for him and *he spread out his paper and filled up the blank according to his paper;* after he had finished he read it over, and when he was through reading he passed both papers to me and he says, 'You look over it; they are both right.' I compared them and looked over them to see that the two were alike. I handed the second one—we call the duplicate—to Mrs. Kuzek, and I held the original while she was reading it over; when she was through she passed it over to me and I signed it, and Mr. Elliott signed, and I suggested that I go out and get Mr. Magaha from the boiler-room and get him to sign; and Mr. Elliott says, 'It don't make any difference; he might be busy; he can sign it tomorrow morning.' I says, 'All right,' and Mrs. Kuzek signed as a witness, and that was all that was done that evening. Mr. Magaha signed the next day, shortly after dinner; to my best recollection and remembrance he read it to himself; I then put the duplicate away with other papers in my box. In about a week or so I sent it to town by Mrs. Kuzek and she placed it on record; I also kept the pencil memorandum. Mr. Elliott took the original along with him as before. I first heard of the loss of the original paper on the 23rd of May. It was in the counting-room of the Alaska Banking and Safe Deposit Company, in the town

of Nome; Mr. Cowden, Mr. Elliott, Mr. Magaha and myself being present. I showed the duplicate to Mr. Cowden, and Mr. Cowden said I was to have 25 per cent according to the terms of the duplicate lease.

Q. In paragraph IV of the original lease. what figures or letters were inserted in line one of said paragraph after the words 'or assigns'?

A. After the words 'or assigns' was the figure '75'.

Q. Are you or are you not able to state that that is an exact copy of the original lease?

A. It is the same; when Mr. Elliott filled up the duplicate and passed both papers to me, he says, 'Look over them; they are both alike.' ''

(Trans. pp. 146-149.)

The only point upon which there seems to be any ambiguity in his testimony is as to whether or not he actually wrote anything on the draft immediately prior to the time that Elliott took it from him and filled it out before making the first original agreement, or merely picked up the pen preparatory to writing and went no further. Without doubt, however, Elliott filled out the greater part of the draft and completed it before drawing the first original therefrom. Appellant denies that he ever told anybody that the lessees were to receive seventy-five per cent of the gold dust from the mine (trans. pp. 177-178); and, referring to his desire to have a duplicate of the agreement made prior to the time it was executed, he says on cross examination:

''Q. How did you happen to save the pencil memorandum, Mr. Kuzek?

A. How did I happen to save it?

(Question read.)

A. I didn't get the duplicate, so I thought I would keep that in the event anything turned up and I didn't have a duplicate of it. I was supposed to keep that.

Q. You had been working for several months without a paper at that time?

A. Yes, sir.

Q. You never felt uneasy about it?

A. Well, there was no paper on either side then. No paper on either side then. I thought if there was any controversy, we would have just as good a chance as they would.

Q. Did you expect any controversy at that time?

A. No, sir.

Q. After the paper was made out, did you expect to have any controversy?

A. I didn't pay much attention to it; *I was waiting patiently until Elliott got sobered up, and I could get him to draw the paper up for me.* I didn't pay much attention to what was going on.

Q. Why did you save the pencil memoranda, then, after you got the other one?

A. I kept it with the other papers we had there; it didn't take extra room for it.

Q. Why was it that you were willing to let these parties work there on an oral lay when you were to receive 75 per cent of the gross output—why didn't you have it reduced to writing in the first place?

A. It was understood that sooner or later we were to draw up the paper, and we neglected it from day to day'' (trans. pp. 179-180).

He further states, and it appears to be established without contradiction, that no words were added to the draft of the agreement since the time it was prepared (trans. pp. 108-181).

Thereafter the court, in a paper designated as an "opinion" (trans. pp. 181-182), "finds that the allega-" tions of the plaintiff's complaint have not been " sustained by the evidence", despite the fact that there was no controversy over the facts that appellant was the owner of the mining claim in question, that the lay agreement set forth in the complaint had been duly executed (though reformation was granted), and that gold had been extracted from the claim by the lessees upon which some royalty was admittedly due appellant. The fact that the stipulation set forth in Finding VII was entered into (trans. pp. 187-188), and at least some payment made to Kuzek as rent or royalty, negatives the correctness of the court's so-called "opinion" above quoted. What the learned court really meant was, that in his judgment the lease should be reformed in accordance with the allegations and prayer of the answer.

Upon a consideration of the evidence we believe it will be at once apparent that the learned court below must have relied entirely upon statements or admissions attributed to appellant in order to find that the alleged mistake made by appellees was mutual to both parties; and, even taking into consideration and assuming as true the conversations testified to by some of appellees' witnesses as competent and material evidence upon the point in issue, we submit that the evidence falls far short of making it a satisfactory case to authorize the court below to reform the instrument. *It will be remembered that the first original lease was prepared from a draft which contained the identical provision*

respecting the royalty that appellant contends for, and that is also contained in the second agreement. As before stated, there is no contradiction of the fact that the draft was fully filled up before the first original was prepared, and the second original was prepared from these documents. These original instruments were wholly in the handwriting of appellee Elliott, excepting the signatures, and part of the draft was likewise in his handwriting. The only document which appellees claim provided for a twenty-five per cent royalty to the appellant is the first agreement, which appears to have been unaccountably and mysteriously lost; and such loss, under the circumstances of the case, with two written documents—one made before and one after it—at variance therewith upon the precise point in issue, must give rise to grave doubt as to the contents of the lost original.

Each duplicate was an original.

1 Greenleaf on Evidence (16 ed.), Sec. 563.

We respectfully submit that appellees have failed to make out a case sufficient to warrant the trial court's judgment or decree in granting reformation of the written lease. The mistake, if it existed, was wholly occasioned by their inexcusable neglect which was not the result of ignorance, surprise, imposition on the part of, or misplaced confidence in anyone.

> "If a party of mature years and sound mind, being able to read and write, without any imposition or artifice to throw him off his guard deliberately signs a written agreement without informing himself as to the nature of its contents, he will

nevertheless be bound, for in such case the law will not permit him to allege as matter of defense his ignorance of what it was his duty to know, nor will a court of equity assist him to avoid the consequences of his negligence."

29 Am. & Eng. Encycl. Law (2nd ed.) 832, and cases there cited.

"Equity will not relieve a person from his erroneous acts or omissions resulting from his own negligence". He must be free from culpable negligence.

2 Pomeroy, Equity Jurisprudence, Secs. 839, 856;

1 Story, Equity Jurisprudence, Sec. 146;

24 Am. & Eng. Ency. of Law (2nd Ed.), pp. 656-657;

Miller v. St. Louis etc. R. Co., 162 Mo. 424; 63 S. W. 85;

Persinger's Adm. v. Chapman et al., 93 Va. 349; 25 S. E. 5;

18 Ency. Pl. & Pr., p. 779;

Pope et al. v. Hoopes et al., (C. C. A.) 90 Fed. 451.

The mistakes which equity will reform are not those which might have been avoided by common and ordinary care and which are the results of negligence.

Young et al. v. McGown, 62 Me. 56;

Graham v. Berryman et al, 19 N. J. Eq. 29;

Voorhis v. Murphy, 26 *id.* 434;

Emery v. Mohler, 69 Ill. 221;

Johnston v. Dunavan et al., 17 Ill. App. 59;

First Nat. Bank v. Gough et al., 61 Ind. 147;

Toops v. Snyder et al., 70 *id.* 554.

In

Moran v. McLarty, 75 N. Y. 25,

the syllabus, in part, reads:

> "Where a party previous to executing a written agreement has full opportunity to examine it so as to know its contents, yet voluntarily signs without making such examination, he cannot claim a reformation of the agreement simply upon evidence that it contains obligations he was not connizant of and did not intend to agree to; there must be clear evidence of a mutual mistake or of fraud to authorize a reformation."

In re West Devon Great Consols Mine, 38 Ch. D. 51;

Grymes v. Sanders et al., 93 U. S. 55;

Montgomery v. Charleston, C. C. A., 99 Fed. 825;

Pope et al. v. Hoopes et al., supra; S. C. 84 *id.* 927;

Fitzpatrick v. Ringo, (Ky.) 5 S. W. 431.

Elliott had the advantage of Kuzek in being a better penman and he offered to draw up the papers. Before preparing the first original he completed a draft of the agreement and with that before him as a model prepared the written contract. He had both the draft and this first original before him when he prepared the duplicate or second original, and it is unquestioned that both the draft and the second original provided for the payment of a 75 per cent royalty to appellant. If the latter, before the preparation of the final contract, had himself inserted this amount of royalty in the draft, would it not have been indicative of his understanding of the agreement which the parties had entered into, either

oral or written? And if Elliott wrote it, does it not conclusively show that appellees understood they would receive only 25 per cent of the gross output of the mine, unless Elliott were guilty of such gross negligence as to bar him from relief in a court of equity?

Looking at the case in its most favorable aspect for appellees, they were at the most only entitled to a *cancellation* of the contract on the ground that the minds of the parties thereto had not met.

1 Story's Equity Jurisprudence, 10th ed., sec. 164, e;

for,

> "A written instrument will not be reformed unless the correction asked for will make the contract express the understanding of both parties thereto at the time it was executed, because where the plaintiff only was mistaken and there was no fraud or other inequitable conduct on the part of the defendant, reformation would result only in the inequitable consequence of shifting from the plaintiff to the defendant the burden of abiding by a contract which he never made."
>
> *18 Enc. Pl. & Pr.,* 781, 782.

To warrant reformation

> "it must appear that both have done what neither intended. * * * Where the minds of the parties have not met there is no contract and hence none to be rectified."
>
> *Hearne v. New England etc. Ins. Co., supra;*

See particularly,

Diman v. Providence etc. R. Co., 5 R. I. 130.

Surely it cannot be said, in executing the lease offered in evidence, that

> "both have done what neither intended. A mistake on one side may be a ground for rescinding, but not for reforming a contract. Where the minds of the parties have not met there is no contract and hence none to be rectified."

Hearne v. New England etc. Ins. Co., supra;
Hughes v. Mer. Mut. Ins. Co., 55 N. Y. 265;
Lyman et al. v. United Ins. Co., 17 Johns 373.

In the absence of other competent evidence a direct conflict of testimony is conclusive against the reformation of a written instrument.

Bobb v. Bobb et al., 7 Mo. App. 501.

It is well established that in an action to obtain the reformation of an instrument on the ground of mistake, the essential prerequisites of such mistake are ignorance, surprise, imposition or misplaced confidence.

2 Pomeroy, Equity Jurisprudence, Sec. 89;
1 Story, Equity Jurisprudence, Sec. 110.

The latter author also says that parol evidence is admissible to reform contracts in cases of fraud, mutual mistake and accident.

1 Story, Equity Jurisprudence, Secs. 155, 156.

There can be no reformation of an instrument required by the statute of frauds to be in writing by parol evidence "except upon the occasion of mistake, "surprise or fraud",

2 Pomeroy, Equity Jurisprudence, Sec. 866,

and reformation is granted under proper circumstances where the mistake is mutual or where the "mistake of one party" is "accompanied by fraud or other in- " equitable conduct of the remaining parties."

2 Pomeroy, Equity Jurisprudence, Sec. 1376.

Judge Story says that a mistake in or ignorance of facts by parties is a proper subject of relief only when it constitutes a material ingredient in the contract of the parties, and disappoints their intention by a mutual error; or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference. .

1 Story, Equity Jurisprudence, Secs. 151, 152.

"Equity will not reform a written contract unless the mistake is proved to be the mistake of both parties, but may *rescind* and *cancel* a contract upon the ground of a mistake of facts material to the contract of one party only."

Werner v. Rawson, 89 Ga. 619; 15 S. E. 813;

15 Am. & Eng. Ency. of Law (1st Ed.), p. 647.

"Where the plaintiff alleges a mistake as a ground for relief, there is a plain distinction between reforming a writing and cancelling it. Under some circumstances, equity will cancel a contract because of a mistake of both or one of the

> parties. Thus, while a court of equity will not reform a written contract upon the ground of mistake, unless the mistake is shown to be common to both parties, yet it may exercise its power to grant relief in a proper case by rescinding and cancelling the writing upon the ground of a mistake of facts material to the contract by one party only."
>
> *18 Ency. Pl. & Pr.*, p. 761,

and cases there cited.

> "A mutual mistake which will afford a ground for relief by a reforming of a written instrument means a mistake reciprocal and common to both parties, when each alike labors under a misconception in respect to the facts."
>
> *MacVeagh et al. v. Burns*, 2 S. Dak. 83; 48 N. W. 835;
>
> *18 Ency. Pl. & Pr.*, pp. 781, 818;
>
> *Evarts v. Steger et al.*, 5 Or. 147;
>
> *Newell et al. v. Stiles*, 21 Ga. 118;
>
> *Arter v. Cairo Democrat Co. et al.*, 72 Ill. 434;
>
> *Meier et al. v. Kelly et al.*, 20 Or. 86;
>
> *24 Am. & Eng. Ency. of Law* (2nd Ed.), pp. 648-650,

and cases there cited.

Many are the authorities bearing upon the character and strength of evidence required to justify a court in reforming an instrument. Both of these eminent authors on equity, Professor Pomeroy and Judge Story, insist that where relief may be granted on parol evidence such evidence "must be *most clear and convincing* " * * * the *strongest possible*", reformation only being granted "upon *a certainty of the error*", that is

by such evidence as would be virtually required to convict in a criminal case.

2 Pomeroy, Equity Jurisprudence, Sec. 859;
1 Story, Equity Jurisprudence, Sec. 157.

See further,

Adams et al. v. Henderson et al., 168 U. S. 573.

It is said that where the only relief sought is the reformation of an instrument, a previous demand for its correction is necessary therefor.

24 Am. & Eng. Ency. of Law (2nd Ed.), p. 656, and cases cited.

Said the Supreme Court of the United States,

> "Of course, parol proof, in all such cases," (for the reformation of a contract on the ground of mistake) "is to be received with great caution. and, where the mistake is denied, should never be made the foundation of a decree, variant from the written contract, except it be of the *clearest* and *most satisfactory* character."
>
> *Snell et al. v. Atlantic etc. Ins. Co.,* 8 Otto 85.
>
> The jurisdiction of equity to reform written instruments, where there is a mutual mistake, or mistake on one side and fraud or inequitable conduct on the other, is undoubted; but to justify such reformation the evidence must be *sufficiently cogent to thoroughly satisfy the mind* of the court."
>
> *Simmons Creek Coal Co. v. Doran,* 142 U. S. 417, and authorities there cited.

In

Ivinson v. Hutton, 8 Otto 79,

"Relief in such a case can only be granted in a court of equity; and Judge Story says, if the mistake is made out of proofs *entirely satisfactory,* equity will reform the contract so as to make it conform to the precise intent of the parties; but if the proofs are doubtful and unsatisfactory, and the mistake is not made *entirely plain,* equity will withhold relief, upon the ground that the written paper ought to be treated as a full and correct expression of the intent, until the contrary is established beyond reasonable controversy * * * and the power" to reform "should always be exercised with *great caution,* and only in cases where the proof is *entirely satisfactory.* * * * The evidence" as to the mistake "must be such as to leave *no reasonable doubt* upon the mind of the court * * * The mistake must be mutual and common to both parties to the instrument. It must appear that both have done what neither intended * * * A mistake on one side may be a ground for rescinding, but not for reforming, a contract * * * Where the minds of the parties have not met there is no contract, and hence none to be rectified * * * ", citing many authorities.

In

Howland v. Blake et al., 7 Otto 624,

the court said:

"Where a written instrument is sought to be reformed upon the ground that by mistake it does not correctly set forth the intention of the parties * * * the burden rests upon the moving party of *overcoming the strong presumption arising from the terms of the written instrument.* If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony *entirely plain and convincing beyond reasonable*

controversy, the writing will be held to express correctly the intention of the parties. A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed away by loose and inconclusive evidence."

Marvin v. Bennett et al., supra.

"It can scarcely need authority to prove that the evidence necessary to sustain such an alleged essential variance between the contract intended and that executed, should be *strong and convincing.* The rational presumption will always be that the deeds were the conclusive agreements; but the authorities go beyond this. To invalidate such an instrument, said Lord Chancellor Thurlow, 'a mistake should be proved *as much to the satisfaction of the court as if it were admitted',* Brown C. C. 94. In another analogous, the same able Chancellor demanded *'irrefragable proof',* and his more illustrious predecessor, Lord Hardwicke, insisted that there must be 'proper proof, and the *strongest proof possible';* and in all these requirements of the *highest evidence,* our own Chancellor Kent has concurred."

Gillespie et al. v. Moon, 2 Johns. Ch. R. 585;

Harrison v. Insurance Co., 30 Fed. 862;

Kleinsorge et al. v. Rohse, (Or.) 34 Pac. 874;

Kuchenbeiser et al. v. Beckert et al., 41 Ill. 172;

Ford et al. v. Joyce et al., 78 N. Y. 618.

In *Vary v. Shea et al.,* 36 Mich. 388, Chief Justice Cooley said:

"The evidence of a mistake in a written contract on which the court should act in giving relief, ought to be *so clear as to establish the fact beyond cavil.* Especially should this be the case when the party setting up the mistake has had the contract

prepared by his own professional adviser, and apparently with care and deliberation."

The reformation of a contract

"is an exercise of power which a court of equity, if not reluctant to make, would make only on the *strongest and clearest* evidence, and for the *strongest* reasons."

1 Parsons Mar. Ins. 151.

"To justify the remedial action of the court, the existence of the mistake, if positively denied by the insurer, must be established by proof *morally irresistible.*"

Id., 151, note 1.

The proof of the error

"must be such as to remove *all possible doubt* from the mind of the court."

1 Duer on Ins., Lect. 1, note XI.

"It must be *strong, irrefragable evidence.*"

Lord Thurlow in Shelburn v. Inchequin, 1 Brown Ch., 341.

"It should be proved as much to the satisfaction of the court *as if it were admitted.*"

Irnham v. Clark, 1 Brown Ch., 92;

Townsend v. Stangroom, 6 Ves. Jr. 328.

The evidence of mistake must be *plenary,* and leave no doubt in the mind.

Tucker v. Madden, 44 Me. 216.

So Chancellor Kent, in

Lyman v. United Ins. Co., supra,

in dismissing a bill to reform a policy, refers to

Gillespie v. Moon, supra.

and says that in that case

"reference was made to the successive opinions of Lords Hardwicke, Thurlow and Eldon (1 Ves., 317; 1 Brown, 94; 6 Ves. 328), in favor of the most *demonstrative* proof, especially against the answer denying the mistake."

Graves v. Boston Mar. Ins. Co., 2 Cranch. 419;

Hileman v. Wright, 9 Ind. 127;

Hall v. Clagett, 2 Md. Ch. Dec. 153;

Philpot v. Elliott, 4 Md. Ch. Dec. 275;

Watkins v. Stockritt, 6 Har. & John. 445;

Davidson v. Greer, 3 Sneed 384;

Kent v. Manchester, 29 Barb. 595.

"It has been required by the party seeking to be relieved upon the ground of mistake, to produce, *if not quite, almost incontrovertible proof,* or, to use the language of a distinguished chancellor, 'proof clear and overwhelming.'"

Beards Exec'r v. Hubble, 2 Gill 431;

Nevins v. Dunlap, 33 N. Y. 676;

Newton v. Marsden, 31 Law J. Ch. 690-709.

"The proof must be such as will strike all minds alike, as being *unquestionable* and free from doubt."

Edmonds' Appeal, 59 Penn. St. R. 220-222;

1 Story Eq. Jr., sec. 157;

Stockbridge Iron Co. v. Hudson Iron Co., 102 Mass. 45; 107 Mass. 290-317;
United States v. Munro, 5 Mason 572-577.

In

Bowers et al. v. N. Y. Life Ins. Co., 68 Fed. 785,

the court quotes approvingly from a Maine decision that

> "a deed which can be seen and read is a wall of evidence against oral assaults, and cannot be battered down by such assaults, unless the evidence is *clear and strong, satisfactory and convincing.*"

Can it be said that the evidence in this case upon which reformation of the contract was granted conforms to the requirements of strength and conclusiveness laid down by the eminent authorities we have just briefly quoted? Does the perusal of the record carry conviction to the unprejudiced mind that the parties to this controversy agreed upon a royalty of 25 per cent to the lessor, despite the positive asseverations to the contrary of appellant who executed the instrument as principal, and of his wife who executed it as a witness, and despite the provisions, controlling in their effect, of the draft of the instrument thus reformed and the duplicate of that original subsequently made and proffered in evidence? Does a case commend itself to the court where the party seeking reformation admits his own carelessness and admits the existence of circumstances that show he was more than merely careless when he, by his own hand, prepared and executed the instru-

ment which he subsequently attacked? If the terms of instruments solemnly entered into can thus be set at naught upon loose admissions or declarations, if made at all, and the vague testimony of those who claim to have seen in the lost instrument the provision for which appellees contend, of what avail is the writing itself, or the terms of the agreement previously reduced to writing in the draft from which such agreement was copied? The decision of the court below operates to place a premium upon carelessness and negligence utterly at variance with the rules laid down by the learned chancellors whose opinions we have referred to and who have viewed the reformation of a writing deliberately entered into as a serious matter, not to be granted unless clearly and convincingly warranted by the facts and circumstances of the case.

We submit that the evidence utterly fails to sustain the judgment of the learned court below and, for the reasons hereinbefore given, that it should be reversed.

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